Supreme Court, U.S.
FILED

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No. -

IN THE

Supreme Court of the United States

ROBERT KUHLMANN, Superintendent,
Sullivan Correctional Facility

Petitioner,

- against -

ROBERT BOHAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 12, 2003

QUESTIONS PRESENTED

1. Under Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646 (1988), may a trial court constitutionally preclude an alibi witness on account of the defendant's failure to give alibi notice only if the failure to provide notice was willful?

2. Did "clearly established Federal law" announced by this Court provide that an alibi witness cannot be precluded on account of the failure to give alibi notice except if the failure to provide notice was willful?

3. May a federal habeas court override a state appellate court's conclusion that the defendant was not prejudiced by his attorney's failure to give alibi notice, where the federal court itself acknowledges that the record "gives cause for some hesitation" as to the impact of the precluded testimony?

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert Kuhlmann, Superintendent of the Sullivan Correctional Facility, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding, affirming the judgment of the district court which granted respondent's petition for a writ of habeas corpus, thereby setting aside his state court conviction for intentional murder.[1]

OPINIONS BELOW

The Summary Order of the Court of Appeals for the Second Circuit is not reported, but can be found at 66 Fed. Appx. 277, 2003 U.S. App. LEXIS 12272 (2d Cir. 2003). The decision is reprinted in the appendix to this petition at pp. 1a-3a.

The Order of the Court of Appeals for the Second Circuit denying petitioner's request for a panel rehearing and rehearing en banc is not reported. It is reprinted in the appendix at p. 4a.

The Opinion and Order of the United States District Court for the Southern District of New York (Marrero, J.), is reported at 234 F.Supp.2d 231 (S.D.N.Y. 2002). It is reprinted in the appendix at pp. 5a-42a.

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[1] The petitioner is represented in this proceeding by the District Attorney of New York County, New York, by agreement with the Attorney General of the State of New York.

The Magistrate's Report and Recommendation (Francis IV) is reported at 2001 U.S. Dist. LEXIS 21852 (S.D.N.Y. 2001). In addition, it is attached to the District Court's reported decision and can be found at 234 F. Supp.2d at 254-83. It is reprinted in the appendix at pp. 43a-106a.

The Decision of the Appellate Division, First Department unanimously affirming the judgment of conviction is reported at 257 A.D.2d 443, 684 N.Y.S.2d 514 (1st Dept. 1999). It is reprinted in the appendix at pp. 107a-109a. The order of the New York Court of Appeals denying Bohan's application for leave to appeal from that decision is reported at 93 N.Y.2d 871, 689 N.Y.S.2d 433 (1999).

JURISDICTION

This petition for a writ of habeas corpus was filed in the Southern District of New York invoking federal jurisdiction under 28 U.S.C. §2254. On August 2, 2002, the Southern District adopted the Report and Recommendation of the Magistrate Judge and granted the petition.

On June 16, 2003, the Second Circuit affirmed that disposition in a Summary Order. On June 30, 2003, Kuhlmann filed a petition for a panel rehearing or a rehearing en banc. The Second Circuit denied that request by order dated August 18, 2003, and then issued its mandate on September 12, 2003.

This petition for certiorari is filed within ninety days of the date on which petitioner's petition for a panel rehearing or rehearing en banc was denied and is therefore timely. Sup. Ct. R. 13. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254(d)(1) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

New York Criminal Procedure Law Section 250.20 provides in pertinent part:

> 1. At any time, not more than twenty days after arraignment, the people may serve upon the defendant or his counsel, and file a copy thereof with the court, a demand that if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support of such defense, he must, within eight days of service of such demand, serve upon the people, and file a copy thereof with the court, a "notice of alibi," reciting (a) the place or places where the defendant claims to have been at the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon

whom he intends to rely. For good cause shown, the court may extend the period for service of the notice.

* * *

3. If at the trial the defendant calls such an alibi witness without having served the demanded notice of alibi, or if having served such a notice he calls a witness not specified therein, the court may exclude any testimony of such witness relating to the alibi defense. The court may in its discretion receive such testimony, but before doing so, it must, upon application of the people, grant an adjournment not in excess of three days.

* * *

5. Both the defendant and the people shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their witness lists as provided in this section.

STATEMENT OF THE CASE

The Trial Court Proceedings

The State's evidence at the jury trial established that, on the night of January 12, 1993, respondent Robert Bohan shot 18-year-old Joseph Alvarez, in an execution-style killing. Notably, the murder scene, the sidewalk in front of a building on West 167th Street in Manhattan, was illuminated

by a street light. One eyewitness, the victim's best friend, had seen Bohan before, and identified him as Alvarez's murderer at a lineup the very day after the shooting. A second eyewitness joined him at trial in identifying Bohan as Alvarez's executioner. In addition, the State presented trial testimony that there had been an ongoing dispute between Bohan and the victim, with a number of witnesses testifying that they saw Bohan meet with the victim on various dates, including the very afternoon preceding the murder.

Bohan called a variety of friends, relatives, and long-time acquaintances as defense witnesses. Two defense witnesses claimed that they had been at the crime scene and that Bohan was not the murderer. Their descriptions of the "true" killer, however, were starkly contradictory. Further, one defense witness who reported being at the crime scene, Carmen Rivera, was impeached with evidence that she previously had made oral and written statements that named Bohan as Alvarez's killer.

The defense also was allowed to call two alibi witnesses, even though it never gave any alibi notice, as required by New York statute (N.Y. Criminal Procedure Law ["CPL"] § 250.20). The alibi witnesses -- Bohan's grandmother and a long-time friend -- testified that, at the time of the shooting, Bohan was at his grandmother's apartment.

When the defense sought to call yet a third alibi witness for whom it had not given the requisite statutory notice, the State objected that, unlike the other two, it had never even heard of that witness before. According to the defense proffer, this third witness, Bernardo Rodriguez ("Bernardo"), had been standing on the sidewalk outside Bohan's grandmother's apartment building and had briefly seen Bohan standing in the window of his grandmother's bedroom (Tr. 345-46). Defense counsel had been in possession of a written statement from Bernardo for over a

year, but had never disclosed it to the State. At the same time, Bernardo had not come forward even to defense counsel until more than a year after the murder and Bohan's prompt arrest for that crime.

The trial judge noted that the prosecutor had lost the opportunity to send out his own investigator to try to question Bernardo (Tr. 306). When defense counsel questioned the existence of prejudice, the judge noted that the case was "two and a half years old" (Tr. 310). The prosecutor reiterated that the State did not have "enough time to properly investigate" Bernardo (Tr. 357), and accordingly "would not be able to do a proper cross examination" (Tr. 358). Ruling that she would grant the State's request to preclude Bernardo's testimony, the judge stated, "[t]he point of these notices is that you have a right to put on a defense, but [the] People have a right to prevent perjurious testimony from being presented to the jury and the way they can do that is if they have an opportunity to investigate" (Tr. 359-60). The judge added that she did not know "what is going on here," and had never before seen a trial "where every day a new [witness] comes up out of the air in a case that is two and a half years old" (Tr. 360).

The jury convicted Bohan of intentional murder. On October 11, 1995, Bohan was sentenced to an indeterminate prison term of from 25 years to life.

The Appeal to the Appellate Division

On appeal, the Appellate Division, First Department, of the New York Supreme Court ("First Department") held, inter alia, that the trial court had properly exercised its discretion in precluding the defense from calling Bernardo as an alibi witness where the defense concededly never gave the requisite alibi notice. 257 A.D.2d at 443, 684 N.Y.S.2d at

515. The First Department specifically remarked that, because of the failure to provide alibi notice, "the People were deprived of the opportunity to conduct a proper investigation regarding any of the alibi testimony." Id. In addition, the First Department held that Bohan had received meaningful legal representation, and that his counsel's alleged errors, which included the failure to file the requisite alibi notice, "could not have deprived [Bohan] of a fair trial." Id. at 444, 684 N.Y.S.2d at 515.

The Proceedings in Federal District Court

On June 7, 2000, Bohan filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The petition's seven claims included two that implicated the preclusion of Bernardo's testimony. Bohan claimed that the preclusion of Bernardo's testimony deprived him of his constitutional right to present a defense. In addition, Bohan claimed that the failure to give the requisite alibi notice rendered trial counsel's representation ineffective.

On August 2 and October 1, 2001, Magistrate Judge Francis held a hearing with respect to those claims. At that hearing, the State showed that an important aspect of Bernardo's proffered alibi testimony was inconsistent with the version of the alibi given by Bohan, his mother, and his grandmother before the grand jury. Bernardo's account also was at odds with statements to the police by the friends who allegedly had been with Bohan in his grandmother's apartment at the time of the murder.

Nevertheless, on December 28, 2001, the Magistrate issued a report recommending that the writ be granted on the grounds that Bohan's trial counsel "was ineffective in failing to serve an alibi notice," and that the resulting preclusion of

Bernardo's testimony "denied the petitioner his right to present a defense." 2001 U.S. Dist. LEXIS 21852 at *2. According to the Magistrate, defense counsel's failure to give alibi notice in this case was not willful. Therefore, the Magistrate concluded, the state courts' determination that the preclusion of Bernardo's testimony was appropriate was contrary to this Court's precedent in Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646 (1988). Id. at *73 -*74. The Magistrate relied heavily on the Second Circuit's decision in Noble v. Kelly, 246 F.3d 93 (2d Cir.), cert. denied, 534 U.S. 886 (2001). Id. at *61. With respect to the ineffective assistance of counsel claim, the Magistrate determined that there "was no reasonable justification" for the state appellate court's conclusion that the preclusion of Bernardo's testimony "did not result in the deprivation of a fair trial for the petitioner." Id. at *88.

The District Court judge adopted the Magistrate's Report. The court reached its conclusion "under the reasoning of Noble" v. Kelly, which, it stated, established that "if the Trial Court in the instant case could have used less onerous sanctions to minimize any prejudice to the prosecution, some finding of willfulness was required to justify the exclusion of [Bernardo's] testimony." 234 F. Supp.2d at 248. The court dismissed the State's argument that Noble was not Supreme Court precedent, and thus could not be the source of "clearly established Federal law" for purposes of the habeas statute. Judge Marrero asserted that Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), "does not indicate that a district court is required, or even permitted, to disregard the Circuit's interpretation of 'clearly established Federal law, as determined by the Supreme Court'." 234 F. Supp.2d at 248 n.10.

At the same time that it rejected the State's argument that any error was harmless, the district court stated that it was "mindful that the record here gives cause for some

hesitation." 234 F.Supp.2d at 252. In that regard, the court acknowledged that "there was more than sufficient evidence presented at trial for a rational juror to conclude that Bohan committed the murder in question." Id. The court also acknowledged that "[t]he jury may very well have discredited the testimony of" Bernardo. Id. It stated, however, that it did "not find that this outcome was as inevitable as the State asserts." Id.

The district court's analysis of the prejudice prong of the ineffective assistance of counsel claim referred repeatedly to, and mirrored, its harmless error analysis. The court stated that the state appellate court had "incorrectly concluded" that the preclusion of Bernardo's testimony "could not have deprived [Bohan] of a fair trial." 234 F. Supp.2d at 254. The court opined that, "if the jury had credited [Bernardo's] testimony even partially, there is a reasonable probability that the outcome of the trial would have been different." Id.

The Second Circuit's Decision

In a Summary Order, the Second Circuit (Judges Miner, Jacobs, and Cabranes) "affirm[ed] for substantially the reasons stated by the district court." But the panel, while stating that it was "constrained by" Noble v. Kelly, frankly expressed reservations about the reasoning in that case. In particular, the Summary Order stated, "we have doubts as to whether Taylor v. Illinois prohibits state courts from precluding an un-noticed alibi witness from testifying if less onerous sanctions are available, absent a finding of willfulness" (internal citation omitted).

REASONS FOR GRANTING THE WRIT

I. The Circuits are Split as to When a Trial Court May Properly Preclude a Defense Witness from Testifying as a Sanction for the Failure to Comply with Applicable Disclosure Rules.

In this case, the state trial court allowed two un-noticed alibi witnesses to testify but precluded the testimony of a third un-noticed alibi witness, whom the State had never even heard of before. The state court did not determine that defense counsel's failure to give alibi notice had been "willful," but found that the State had been deprived of its opportunity to investigate the precluded witness and to protect the trial process from the influence of perjurious testimony. The Second Circuit set aside the state conviction on the theory that willful misconduct by defense counsel is a prerequisite to the preclusion of a last-minute alibi witness. The Ninth Circuit has held similarly. See United States v. Peters, 937 F.2d 1422, 1426 (9th Cir. 1991). That position, however, conflicts with that of the majority of the circuits to have considered the issue.

The First, Fifth, Seventh, Tenth, and District of Columbia Circuits all have rejected the position that this Court's opinion in Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, prevents a court from precluding alibi testimony not disclosed to the prosecution in accordance with applicable notice requirements except upon a finding that defense counsel's failure was the result of willful misconduct. For example, the First Circuit has stated that Taylor "declined to cast a mechanical standard." Chappee v. Vose, 843 F.2d 25, 29 (1st Cir. 1988). In that Court's own words, the First Circuit has "never held that willfulness is the sole predicate of an exclusionary sanction," United States v. Portela, 167

F.3d 687, 705 n.16 (1st Cir. 1999). In the same vein, in United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992), the District of Columbia Circuit stated that "any requirement of bad faith as an absolute condition to exclusion would be inconsistent with the Taylor Court's reference to trial court discretion and its extended discussion of the relevant factors."

The Fifth Circuit has stated that Taylor gives "little guidance for determining when the preclusion sanction is permissible." United States v. Alexander, 869 F.2d 808, 812 (5th Cir. 1989), cert. denied, 493 U.S. 1069 (1990). By the same token, the Seventh Circuit has maintained that Taylor "appears to leave the question open" of whether the exclusion of a defense witness is permissible only if the violation of the discovery order was "deliberate." Tyson v. Trigg, 50 F.3d 436, 445 (7th Cir. 1995), cert. denied, 516 U.S. 1041 (1996). That Court further noted that discovery rules "are empty if they cannot be enforced, and weak if they can be enforced only against willful violators." Id. As articulated by the Seventh Circuit, "[g]iven the competing considerations identified" in Taylor, a federal habeas court should not disturb a state court's discovery ruling unless "convinced" that the ruling was "unreasonable." Id.

In Watley v. Williams, 218 F.3d 1156 (10th Cir. 2000), cert. denied, 531 U.S. 1089 (2001), the Tenth Circuit held that the state court reasonably applied Taylor in upholding the preclusion of a defense alibi witness even though the attorney's failure to give the requisite notice was not willful. Just as in this case, the state court had emphasized that the prosecution would suffer prejudice if the un-noticed alibi testimony were admitted. 218 F.3d at 1159. In addition, just as the trial court in this case referred to "perjurious testimony" (Tr. 359), the state appellate court in Watley had commented that, "because of its late discovery, [the precluded witness's] testimony calls into question the

integrity of the judicial process." 218 F.3d at 1159. Tellingly, the Tenth Circuit concluded:

> Reasonable minds may disagree about the appropriateness of excluding an alibi witness whom Petitioner's counsel did not willfully omit, but under [section 2254(d)(1)] we are limited to applying existing Supreme Court precedent. Because the New Mexico Court of Appeals reasonably applied Taylor v. Illinois, we affirm the district court's denial of Petitioner's claim for relief.

Id. at 1159-60.

Accordingly, there is a split in the circuits as to when a trial court may properly preclude a defense witness from testifying as a sanction for the failure to comply with applicable disclosure rules. The need for resolution of this split among the circuits cannot be underestimated.

Alibi-notice statutes or rules are commonplace in the various states. In addition to the New York alibi-notice statute, the other two states in the Second Circuit, Connecticut and Vermont, have rules requiring advance notice of alibi witnesses. See Connecticut Rules for the Superior Court §§ 762-68; V.R.Cr.P. 12.1. The federal judicial system itself is governed by an alibi-notice requirement. Fed. Rules Cr. Proc. Rule 12.1, 18 U.S.C.A. (2003 Pocket Part). Further, as stated in the notes accompanying the initial enactment of the Federal Rule, prohibiting the testimony of a witness as to whom the defense has not given the requisite notice is a "common provision" in state alibi-notice statutes. Notes of Advisory Committee on Rules, Rule 12.1, Fed. Rules Cr. Proc. Rule 12.1, 18 U.S.C.A. at 76 (West Publishing 1986). As the notes explain, "[i]t is generally assumed that the [preclusion]

sanction is essential if the notice-of-alibi rule is to have practical significance." Id. The judicially-imposed restriction of the preclusion sanction to those extraordinary cases in which the record affirmatively shows that defense counsel's failure to give alibi notice was the result of willful misconduct would eviscerate alibi notice requirements. Certainly, with the decision in this case, courts and prosecutors can no longer rely on New York's alibi-notice statute, and also act at their peril in seeking the preclusion sanction authorized under Connecticut's and Vermont's alibi-notice rules.[2] And, as the law now stands, similar alibi notice statutes irrationally will have different consequences depending on the jurisdiction in which a crime is committed.

As this Court has expressly recognized, alibi testimony "can be fabricated" with "ease." Williams v. Florida, 399 U.S. 78, 81, 90 S. Ct. 1893, 1896 (1970). Because of that reality, alibi-notice requirements are "designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." Id. at 82, 90 S. Ct. at 1896. The current split in the circuits undermines that salutary goal.

Further, the Second Circuit position does not give effect to the full panoply of interests and concerns identified by this Court in Taylor v. Illinois. Taylor held that the Sixth Amendment right to present a defense does not create an absolute bar to the preclusion of the testimony of a previously undisclosed defense witness. See 484 U.S. at 410-16, 108 S. Ct. at 653-56. This Court stated that "[i]t would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an

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[2] Notably, under Vermont's rules, preclusion of the testimony of an un-noticed alibi witness is mandatory, "except for good cause shown." V.R.Cr.P. 12.1(e).

automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury." Id. at 416, 108 S. Ct. at 656. With respect to the facts of the particular case, this Court held that defense counsel's willful misconduct supported the use of the preclusion sanction. Id. at 417, 108 S. Ct. at 657. This Court did not, however, further hold that the preclusion sanction could never properly be employed where defense counsel did not engage in willful misconduct. To the contrary, this Court stated that "it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." Id. at 414, 108 S. Ct. at 656. Rather than iron-clad rules, this Court called for a balancing process:

> The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Id. at 414-15, 108 S. Ct. at 656.

By according determinative weight to whether defense counsel acted in bad faith, the Second Circuit gives improperly short shrift to the other factors that this Court expressly identified in Taylor v. Illinois as bearing on the propriety of the use of the preclusion sanction. Indeed, even while the Second Circuit gave lip service to the prejudice to the State from an eleventh-hour defense alibi witness, the breezy reference to "minimiz[ing]" such prejudice did not give proper weight to that factor. In addition, the Second Circuit position essentially ignores what Taylor emphasized was "the broader public interest in a full and truthful

disclosure of critical facts." 484 U.S. at 412, 108 S. Ct. at 654.

It is of no small moment that the panel that affirmed the grant of the writ of habeas corpus in this case itself expressed doubt that the Second Circuit position that un-noticed alibi testimony cannot be precluded except when there is a finding of willful misconduct constitutes a proper interpretation of Taylor v Illinois. Unfortunately, the panel felt constrained by Second Circuit precedent not to re-examine that position. Only this Court therefore can rectify the law in the Second and Ninth Circuits, make the law across jurisdictions uniform by resolving the split in the circuits, and establish that Taylor v. Illinois should not be interpreted in a way that eviscerates alibi-notice statutes.

II. Under Williams v. Taylor, the court below wrongly applied Second Circuit law when there was no clearly established law from this Court.

The split in the circuits as to how to understand Taylor v. Illinois has a special significance in this habeas corpus case that went unnoticed in the courts below. Under this Court's seminal decision in Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, the mere existence of a dramatic conflict in the circuits means that the state court rulings here did not run afoul of "clearly" established Federal law, as required before a federal habeas court may properly set aside a state criminal conviction. As stated in Williams v. Taylor, "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." 529 U.S. at 404, 120 S. Ct. at 1518. To that end, current habeas law constrains the power of a federal habeas court to set aside state criminal convictions, see id. at 412, 120 S. Ct. at 1523, to instances in which a state court decision runs afoul of "clearly established Federal law, as determined by" this

Court. 28 U.S.C. §2254(d)(1). When different circuits interpret the same Supreme Court opinion differently, the ineluctable conclusion is that there is no "clearly established" Supreme Court precedent with which a state court decision could be in conflict.

Again, it is telling that the Second Circuit panel itself stated that, while it felt constrained to reach the result it did under the Second Circuit's prior opinion in Noble v. Kelly, it doubted whether the position that a trial court could not preclude an un-noticed alibi witness absent a finding of willful misconduct by defense counsel was a correct interpretation of this Court's opinion in Taylor v. Illinois. Under Williams v. Taylor, none of the circuit court opinions discussing the interpretation of Taylor v. Illinois itself constitutes clearly established federal law for habeas purposes. The Second Circuit and the district court both were wrong to feel constrained by Noble v. Kelly, when Taylor v. Illinois was the true touchstone.

In fact, for reasons discussed in detail in the briefs below, but too lengthy for inclusion in a petition for certiorari, the preclusion of Bernardo's un-noticed alibi testimony when the defense was allowed to call two other alibi witnesses, at the very least, constituted a reasonable balancing of the various factors mentioned in Taylor v. Illinois. The state court decisions in this case therefore constituted a reasonable application of federal law. Thus, the Second Circuit decision in this case is at odds not only with the law in other circuits but also with the intent of Congress, as reflected in the current habeas statute, and as repeatedly recognized in this Court's decisions, to give deference to state court decisions.

III. The federal courts did not give proper deference to the state court's determination that the preclusion of Bernardo's testimony did not deprive Bohan of a fair trial.

The analysis in this case of the prejudice prong of the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), also conflicts with this Court's habeas jurisprudence. Williams v. Taylor established that "an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." 529 U.S. at 412, 120 S. Ct. at 1522 (emphasis in the original). What that meant, said this Court, was that

> [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable.

Id. Echoing those principles, this Court stated in Woodford v. Visciotti, 537 U.S. 19, 27, 123 S. Ct. 357, 361 (2002):

> [U]nder § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly. The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.

(internal citation omitted).

The district court in this case determined that the state appellate court's conclusion that the preclusion of Bernardo's testimony "could not have deprived [Bohan] of a fair trial," 257 A.D.2d at 444, 684 N.Y.S.2d at 515, was "incorrect[]," 234 F.Supp.2d at 254. The Second Circuit left that determination undisturbed. But, in fact, the federal district court here did precisely what this Court's decisions teach that a federal habeas court should not do -- it substituted its own independent judgment with respect to the Strickland prejudice prong for the judgment of the state appellate court.

Had the district court focused on the correct issue of whether the state appellate court's decision was "objectively unreasonable," its own statements show that the writ should not have been granted. After all, how could it have been objectively unreasonable for the state court to conclude that the preclusion of Bernardo's testimony did not prejudice Bohan when the district court itself stated that the record "gives cause for some hesitation," that there was "more than sufficient evidence presented at trial for a rational juror to conclude that Bohan committed the murder in question," and that "[t]he jury may very well have discredited the testimony of" Bernardo? 234 F.Supp.2d at 252. The strength of the trial evidence of Bohan's guilt by itself was an appropriate, objective basis for the state court's conclusion. Another objective basis was provided by the weakness of the alibi testimony that the defense did present at trial. And, as the First Circuit has stated, "[i]f it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002).

This Court should use this case to reiterate that a federal habeas court must conduct the Strickland analysis with the appropriate deference to the relevant state court. That is necessary both to give effect to the congressional intent

reflected in current habeas law and to prevent claims of ineffective assistance of counsel from becoming a backhand vehicle for eviscerating alibi-notice requirements.

CONCLUSION

For the aforementioned reasons, petitioner, Robert Kuhlmann, respectfully requests this Court to grant this petition for a writ of certiorari to review the judgment of the Second Circuit setting aside Bohan's state murder conviction.

Respectfully submitted,

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